Supreme Court, U.S.
FILED
JUN 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

86 1958
No.____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE MAINE CENTRAL RAILROAD COMPANY AND
THE PORTLAND TERMINAL COMPANY,

Petitioners,

—v.—

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOHN SPELMAN
Counsel of Record

KLEHR, HARRISON, HARVEY,
BRANZBURG, ELLERS & WEIR
1401 Walnut Street
Philadelphia, Pennsylvania 19102
(215) 568-6060

Of Counsel:

ANDREW O. SCHIFF

Attorneys for Petitioners

June 8, 1987

Questions Presented for Review

1. Whether an act of Congress that intentionally imposes unique, discriminatory burdens solely upon a single, designated individual violates the equal protection component of the fifth amendment?

2. Whether an act of Congress that adjudicates the rights of two private parties in a particular dispute violates the doctrine of separation of powers?

Statement Pursuant to Rule 28.1

Petitioners the Maine Central Railroad Company and the Portland Terminal Company are each wholly-owned subsidiaries of Guilford Transportation Industries, Inc. Petitioners' subsidiaries and affiliates, apart from wholly-owned subsidiaries, are:

Albany Port Railroad Corporation
Albany & Vermont Railroad Company
Blackstone River Estates
Boston Lights, Inc.
Boston and Maine Corporation
Cheshire Bridge Corporation
Delaware and Hudson Railway Company
Delaware River Estates, Inc.
Downtown Development Associates
Eastern Lights, LTD.
Green Island Estates, Inc.
Greenwich & Johnsonville Railway Co.
Guilford Aviation, Inc.
Guilford Motor Express, Inc.
Hudson River Estates, Inc.
Kennebec River Estates, Inc.
Kennebec Water-Front Estates, Inc.
Merrimack River Estates, Inc.
Napierville Jct. Railway Company
Northern Coal & Iron Co.
Northern Lights, LTD.
Northern New York Development Company
Northern Railroad Co.
Railstar Control Technology, Inc.
Pine Tree Corporation
Plattsburgh Estates, Inc.
Portland Cargo Associates
Railstar Control Technology, Inc.
Saratoga & Schenectady Railroad Company
Springfield Terminal Company
Stony Brook Railroad Corporation
Two Rivers, Inc.
Vermont & Massachusetts Railway Company
Wilkes-Barre Connecting Railroad Co.
Wyoming Valley Improvement Co.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Statement Pursuant to Rule 28.1	ii
Table Of Contents	iii
Table Of Authorities	iv
Opinion in The Court Below	1
Jurisdiction	1
Statement Under Rule 28.4(b)	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
1. The Importance of the Question	6
2. The Conflict with Applicable Decisions of this Court	7
A. Equal Protection	7
B. Separation of Powers	16
Conclusion	18

APPENDICES

Appendix A: Opinion of the United States Court of Appeals for the First Circuit	A-1
Appendix B: Opinion of the United States District Court for the District of Maine	B-1
Appendix C: Public Law No. 99-385 (Aug. 21, 1986)	C-1
Appendix D: Public Law No. 99-431 (Sept. 30, 1986)	D-1

TABLE OF AUTHORITIES

Page

Constitutional Provisions

United States

U.S. Const. art. I, § 8, cl. 4 10

U.S. Const. art. I, § 9, cl. 3 10

U.S. Const. art. I, § 10, cl. 1 10

U.S. Const. art. III 16, 17

U.S. Const. amend. V 2, 10

Texas

Texas Const. art. III, § 56 11

Statutes and Regulations

United States

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2403(a) 2

45 U.S.C. §§ 150, et seq. ..... *passim*

Pub. L. No. 99-385, 100 Stat. 819 (Aug. 21, 1986) ..... *passim*

Pub. L. No. 99-431, 100 Stat. 987 (Sept. 30, 1986) 5, 6

Pub. L. No. 100-2, 101 Stat. 4 (Jan. 28, 1987) 7

Executive Order No. 12557, 51 Fed. Reg. 18429 (May 16, 1986) 4

Page

Legislative History

133 Cong. Rec. H395-97 (daily ed. Jan. 27, 1987) 7

133 Cong. Rec. S1186-87 (daily ed. Jan. 27, 1987) 7

Cases

Attorney General of New York v. Soto-Lopez, 106 S. Ct. 2317 (1986) 13

Brotherhood of Maintenance of Way Employees v. Maine Central Railroad Co., 86-0251-P, slip op. (D. Me. Aug. 11, 1986) 4

Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employes, 107 S. Ct. 1841 (1987) 4, 7

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 8

City of New Orleans v. Dukes, 427 U.S. 297 (1976) ... 13

Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245 (1986) 16

Cotting v. Kansas City Stock Yards Co., 183 U.S. 79 (1901) 9, 10

Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) 15

Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949) 14

Eisenstadt v. Baird, 405 U.S. 438 (1972) 9

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 11

TABLE OF AUTHORITIES—*(Continued)*

	Page
Ervine's Appeal, 16 Pa. 256 (1851)	12
Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810)	6
Fort Smith Light & Traction Co. v. Board of Improvement, 274 U.S. 387 (1927)	13, 14
Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984)	10
Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)	17, 18
Hurtado v. California, 110 U.S. 516 (1884)	8, 9, 10, 18
INS v. Chadha, 462 U.S. 919 (1983)	13, 16, 17, 18
Katzenbach v. McClung, 379 U.S. 294 (1964)	12
Larson v. Valente, 456 U.S. 228 (1982)	9
Leeper v. Texas, 139 U.S. 462 (1891)	9
Maine Central Railroad Co. v. Brotherhood of Maintenance of Way Employees, 813 F.2d 484 (1st Cir. 1987)	*passim*
Maine Central Railroad Co. v. Brotherhood of Maintenance of Way Employees, No. 86-0311-P, slip op. (D. Me. Mar. 31, 1987), *appeal docketed*, No. 87-1309 (1st Cir. Apr. 16, 1987)	6
McFarland v. American Sugar Refining Co., 241 U.S. 79 (1916)	10
Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985)	8
Miller v. County of El Paso, 136 Tex. 370, 150 S.W.2d 1000 (1941)	11
Mills v. Habluetzel, 456 U.S. 91 (1982)	11

TABLE OF AUTHORITIES—*(Continued)*

Page

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) ... 9

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) ... 11

Morey v. Doud, 354 U.S. 457 (1957) ... 13

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) ... 13, 14, 15

Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) ... 8

Railway Express Agency v. New York, 336 U.S. 106 (1949) ... 9, 12

Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982) ... 9, 10

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985) ... 16, 18

United States v. Brown, 381 U.S. 437 (1965). 6, 7, 10, 16

United States v. Carolene Products Co., 304 U.S. 144 (1938) ... 8

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) ... 17

Weaver v. Graham, 450 U.S. 24 (1981) ... 10

Wickard v. Filburn, 317 U.S. 111 (1942) ... 12

Page

Other Authorities

J. Choper, *Judicial Review and the National Political Process* (1980) 12

Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984) 8

Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 Sup. Ct. Rev. 127 11

Note, *Private Bills in Congress*, 79 Harv. L. Rev. 1684 (1966) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE MAINE CENTRAL RAILROAD COMPANY AND
THE PORTLAND TERMINAL COMPANY,

Petitioners,

—v.—

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Opinion in The Court Below

The opinion of the United States Court of Appeals for the First Circuit appears at 813 F.2d 484 (1st Cir. 1987) and is reproduced as Appendix A. The opinion of the United States District Court for the District of Maine is unreported and is reproduced as Appendix B.

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the First Circuit were entered on March 10, 1987. This petition was filed within ninety days of that date. The Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

Statement Under Rule 28.4(b)

Because this proceeding draws into question the constitutionality of Pub. L. No. 99-385, 100 Stat. 819 (Aug. 21, 1986), 28 U.S.C. § 2403(a) may be applicable to this case. While neither the district court nor the court of appeals certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question, the United States Department of Justice intervened in the proceedings in the district court, and appeared in the court of appeals as an amicus curiae.

Constitutional Provisions and Statutes Involved

Amendment V

No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The statute involved is Public Law No. 99-385, 100 Stat. 819 (Aug. 21, 1986). It is reproduced as Appendix C.

Statement of the Case

This is a case in which Congress has passed special legislation imposing unique burdens on a single individual in order to prevent another person from unilaterally exercising a Congressionally-guaranteed right to harm unrelated third persons. On August 12, 1986 Congress passed a statute against a small Maine railroad in order to prevent a national labor organization from striking every other railroad across the country. Pub. L. No. 99-385, 100 Stat. 819 (Aug. 21, 1986) (the "Act"). On September 10, 1986 the United States District Court for the District of the Maine upheld the constitutionality of the Act, and on March 10, 1987 the United States Court of Appeals for the First Circuit affirmed the judgment of the District Court. *Maine Central Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 813 F.2d 484

(1st Cir. 1987). Petitioners request that this Court grant review to determine the constitutionality of this novel exercise of Congressional power.

This case arises out of an isolated labor dispute between the Maine Central Railroad Company and its affiliate, the Portland Terminal Company (collectively, the "Railroad"), a small Maine railroad, and the Brotherhood of Maintenance of Way Employees (the "Organization"), a national railway labor union representing 65 of the Railroad's then-active employees and over 50,000 railroad employees nationwide. In 1984, the Organization began the dispute by serving formal notice on the Railroad of the Organization's demand to change its existing collective bargaining agreement, primarily to achieve lifetime employment guarantees and "protection payments" for those employees represented by the Organization. The Railroad had never provided this kind of labor protection to those employees, and it refused to agree to the Organization's demands. (A-2)[1]

The parties conducted negotiations in accordance with the lengthy procedures required by the Railway Labor Act of 1926 (the "RLA"), 45 U.S.C. §§ 150, et seq., which included mediation by the National Mediation Board (the "NMB"). These collective bargaining proceedings were confined to the Railroad, and were not related to or part of any national or regional labor negotiation or agreements. Negotiations continued for nearly two years, but no agreement was reached. (A-2)

On March 3, 1986 the Organization began a strike against the Railroad. That same day, the Railroad, exercising its right to self-help, promulgated new work rules and rates of pay applicable to its employees represented by the Organization. Initially, the Organization struck only the Railroad; but in late March the Organization extended the strike to two other small railroads operated by the Railroad's parent company. In April

---

1. References in this form are to the appendix to this petition.

1986 the Organization extended the strike further to include secondary picketing of other, unrelated railroads as far away as Chicago and Los Angeles. In connection with the Organization's secondary picketing of unrelated railroads, this Court recently held that Congress has expressly permitted unlimited secondary picketing in any railway labor dispute in the United States. *Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841 (1987).

On May 16, 1986, pursuant to the RLA, President Reagan appointed Presidential Emergency Board No. 209 (the "Board") to investigate and report on the dispute. *See* Executive Order No. 12557, 51 Fed. Reg. 18429 (May 16, 1986). Pursuant to the RLA, the appointment of the Board required the parties to return to the status quo that existed prior to the strike, and imposed a temporary moratorium on the use of self-help by either party. *See* 45 U.S.C. § 160. The Board issued its report on June 20, 1986, but the report did not lead to an agreement, and on July 20, 1986 the moratorium expired. (A-3)

Accordingly, on August 6, 1986 the Railroad again promulgated the March 3 work rules and rates of pay, which resulted in significant savings and reduced unproductive and inefficient labor costs. But the Organization did not again strike. Instead, on August 7, 1986 the Organization filed with the United States District Court for the District of Maine an action to enjoin on other grounds the promulgation of the March 3 work rules and rates of pay. By decision dated August 11, 1986 the district court upheld the Railroad's right to promulgate the new work rules and rates of pay and denied the Organization's motion for temporary injunctive relief. (A-3) *See Brotherhood of Maintenance of Way Employees v. Maine Central Railroad Co.*, 86-0251-P, slip op. (D. Me. Aug. 11, 1986).

The day after the district court's decision, with the support of the Organization, Congress passed the Act, which became effective on August 21, 1986. Although the Railroad had experienced debilitating losses and substantial reduction of traffic due to the strike, the Act revoked the March 3 work rules and rates of pay, and imposed on the Railroad the specific and significantly more expensive and burdensome work rules and rates of pay that existed before the strike. Also, the Act retroactively enjoined the Railroad from changing any terms of employment or from resorting to self-help for sixty days: from July 21, 1986 until September 18, 1986. (A-3) But the Act neither affects nor mentions any other railroad or common carrier in the United States. No national labor negotiations or regulatory actions are involved. The Act affects no one other than a small, Maine railroad, singling it out from its competitors and from a nationwide railroad industry which employs over 350,000 persons and operates over hundreds of thousands of miles of track.

The Act expired on September 18, 1986, and the Railroad again promulgated the March 3, 1986 work rules and rates of pay. But the Organization did not strike. Instead, the Organization returned to Congress, and quickly obtained another special act. Pub. L. No. 99-431, 100 Stat. 987 (Sept. 30, 1986) (the "Second Act").[2] The Second Act enacts the specific recommendations of the Board, including unprecedented protection payments and greatly increased labor rates, thereby imposing on the Railroad the single most expensive work rules and rates of pay of their kind in the United States. On October 1, 1986 the Railroad commenced an action in the United States District Court for the District of Maine for declaratory and injunctive relief against the Second Act. (A-3) On March 31, 1987 the district court, relying in part upon the decision of the court of appeals

---

2. The Second Act is reproduced as Appendix D.

in this case, upheld the constitutionality of the Second Act. *See Maine Central Railroad Co. v. Brotherhood of Maintenance of Way Employees*, No. 86-0311-P, slip op. (D. Me. Mar. 31, 1987), *appeal docketed*, No. 87-1309 (1st Cir. Apr. 16, 1987).

Reasons for Granting the Writ

1. The Importance of the Question.

This case presents fundamental constitutional questions involving basic precepts of a democratic society. At issue is the power of Congress to pass special legislation against a single individual and impose unique, discriminatory burdens solely on that individual.

Special legislation is a radical departure from our constitutional heritage. Special legislation is inherently discriminatory, and necessarily reflects a naked political preference against one person in favor of others. Nothing is more dangerous than raw legislative power exercised against only a single person. Nothing is more deserving of heightened judicial scrutiny than special legislation directed against selected and politically powerless individuals. Unless restrained by this Court, there is no logical barrier to special legislation encroaching further into the business of Congress and descending upon any disfavored citizen or entity.

In the last 200 years, Congress has rarely passed special legislation against, or imposed discriminatory burdens on specific individuals. Congress normally adheres to Chief Justice Marshall's statement that:

> It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810); *accord United States v. Brown*, 381 U.S. 437, 446

(1965). While Congress occasionally passes "private bills," these laws nearly always benefit some particular person, and the detriment, if any, is shared by the general public. *See* Note, *Private Bills in Congress*, 79 Harv. L. Rev. 1684, 1687 (1966). But, in recent years Congress has with increasing frequency passed special legislation affecting only a few designated individuals and significantly altering the rights and liabilities of these individuals. In the last few months Congress has done so at least three times in the railroad industry alone: the two bills directed at the Railroad; and one at the Long Island Railroad, Pub. L. No. 100-2, 101 Stat. 4 (Jan. 28, 1987). In fact, the Congressional proponents of the Long Island Railroad statute specifically cited as a precedent for that statute the legislation at issue in this case. *See* 133 Cong. Rec. H395-97 (daily ed. Jan. 27, 1987); 133 Cong. Rec. S1186-87 (daily ed. Jan. 27, 1987).

In light of this Court's decision in *Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841 (1987), it is likely that, unless Congress passes general legislation restricting secondary picketing in the American railroad industry (and no such legislation is pending), Congress will pass special legislation in any of the hundreds of active labor disputes pending in the railroad or airline industries. (A-14) Guidance from this Court is necessary to control this dangerous congressional practice.

2. The Conflict with Applicable Decisions of this Court.

A. *Equal Protection*

This case involves special legislation — a subject rarely explored by this Court. Special legislation is, quite simply, legislation that imposes special burdens on specifically designated individuals, rather than legislation that regulates a general class or industry. Special legislation implicates different constitutional concerns than

general legislation, in two fundamental respects. First, as this Court's cases have repeatedly held, the political process is presumed to correct unwise or improvident general legislation, *see, e.g., Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 n.12 (1980), but where legislation impinges on the rights of "discrete and insular" groups, as does special legislation, there is no such presumption. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (stating that the rational basis test "presumes that even improvident decisions will eventually be rectified by the democratic processes"); *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). Second, the fundamental purpose of equal protection is to prevent the enactment of legislation that is merely a naked political preference in favor of one person at the expense of another. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882 n.10 (1985) (rejecting the notion that "*any* discrimination . . . could be justified simply on the ground that it favored one group at the expense of another.") (emphasis in original); *see generally* Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984).

This Court's cases establish the proposition that special legislation is inherently suspect because special legislation is the paradigm of naked political preferences. As this Court observed in *Hurtado v. California*, 110 U.S. 516 (1884):

> It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case . . . and thus exclud[es], as not due process of law . . . acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its

> edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.

Id. at 535-36; *see also Leeper v. Texas*, 139 U.S. 462, 468 (1891). Similarly, Justice Jackson observed that statutes selecting particular individuals for adverse treatment are likely to result in arbitrary treatment:

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officals would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officals to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring), and this Court has frequently relied upon Justice Jackson's insight. *See Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983); *Larson v. Valente*, 456 U.S. 228, 245-46 (1982); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

The few cases of this Court which have examined special legislation singling out particular individuals for burdensome treatment support the application of heightened scrutiny to such laws, and conflict with the decision of the court of appeals below. In *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79 (1901), the Court invalidated a Kansas statute, which fixed prices for a single company despite the presence of several other companies in the state engaged in the same business. As Justice Brewer noted, the effect of the act was that "the legislature had said in terms that the Kansas City stock yards alone shall be subjected to its

provisions." 183 U.S. at 103 (opinion of Brewer, J.). The majority held the statute unconstitutional because it applied "only to the Kansas City Stock Yards Company, and not to any other companies or corporations engaged in like business in Kansas . . . ." 183 U.S. at 114-15 (Harlan, J.). Likewise, in *McFarland v. American Sugar Refining Co.*, 241 U.S. 79 (1916) (Holmes, J.), a unanimous Court held unconstitutional a Louisiana statute that the legislature clearly directed at a single company. The Court found that "the plaintiff is the only one to whom the act could apply and . . . the statute was passed in view of the plaintiff's conduct, to meet it." *Id.* at 85. The Court noted that "[t]he statute bristles with severities that touch the plaintiff alone" and that "a classification which, if it does not confine itself to the American Sugar Refinery, at least is arbitrary beyond possible justice . . . ." *Id.* at 86.

As *Hurtado* suggests, the Constitution's concern with special legislation is pervasive. For example, the bill of attainder clause, U.S. Const. art. I, § 9, cl. 3, bars "legislative punishment, of any form or severity, of specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965). The *ex post facto* clause, U.S. Const. art. I, § 9, cl. 3, "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The takings clause, U.S. Const. amend. V, "forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984). The uniformity provision of the bankruptcy clause, U.S. Const. art. I, § 8, cl. 4, "prohibits Congress from enacting bankruptcy laws that specifically apply to the affairs of only one named debtor." *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 471 (1982). The contract clause, U.S. Const. art. I, § 10, cl. 1, prevents state governments from substantially impairing the obliga-

tions of contracts, especially to benefit "special interests" at the expense of "specific" or "particular" persons. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 & n.13 (1983).[3] Thus, the constitutional concern with special legislation is, if anything, *more* textually demonstrable than, for example, the concern with gender-based or illegitimacy-based classifications, or with legislation that burdens the right to travel, each of which has been recognized as triggering heightened judicial scrutiny.[4]

---

3. The prohibition of special legislation is so deeply ingrained in the American constitutional tradition that it is reflected in one form or another in the constitutions of most states. *See, e.g.*, Texas Const., art. III, § 56 (prohibiting special legislation in cases that could be governed by general legislation). As the Supreme Court of Texas stated:

> The purpose of this constitutional inhibition against the enactment of local or special laws is a wholesome one. It is intended to prevent the granting of special privileges and to secure uniformity of law throughout the State as far as possible. It is said that at an early period in many of the states the practice of enacting special and local laws became "an efficient mean for the easy enactment of laws for the advancement of personal rather than public interests, and encouraged the reprehensible practice of trading and 'logrolling.' " It was for the suppression of such practices that such a provision was adopted in this and many of the other states of the Union.

Miller v. County of El Paso, 136 Tex. 370, 373-74, 150 S.W.2d 1000, 1001 (1941).

4. This Court's cases provide judicial protection against naked political preferences by creating a series of simple presumptions about what kind of legislative classifications are *most likely* to reflect naked political preferences. For example statutory classifications based on race, sex, or illegitimacy are subject to higher levels of scrutiny than are other kinds of classifications, because the court has found that these "suspect" or "semi-suspect" classifications are more likely to reflect naked preferences than are other types of classifications. *See* Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 Sup. Ct. Rev. 127, 140. *Cf. Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (gender); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (illegitimacy).

The political protections that justify the rational basis test simply break down when Congress selects a single person for adverse treatment. A single person, standing alone, cannot possibly protect himself in the national political arena. *See Railway Express Agency*, 336 U.S. at 112-13 (Jackson, J., concurring); *see also Ervine's Appeal*, 16 Pa. 256, 268 (1851) ("[W]hen individuals are selected from the mass, and laws are enacted affecting their property, without summons or notice, at the instigation of an interested party, who is to stand up for them, thus isolated from the mass, in injury and injustice, or where are they to seek relief from such acts of despotic power?"); J. Choper, *Judicial Review and the National Political Process* 69 (1980) ("The smaller the allegedly aggrieved group and the more intense the felt need . . . of the majority, the greater the necessity of judicial review for the preservation of personal liberty.").

In the absence of political protection, the rational basis test is reduced to an absurdity. Congress has sweeping power to regulate interstate commerce and little, if any, economic activity falls outside its reach. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942). Without meaningful political protection against arbitrary action provided by generality in legislation, or meaningful judicial protection provided by heightened scrutiny, there is little Congress cannot do to disfavored individuals under the credible guise of regulating interstate commerce. For example, without these protections, nothing would prevent Congress from, as has happened here, passing legislation dictating the specific labor rates or prices of only particular companies, and not their competitors, which may well "rationally relate" in some way to Congress's power to regulate interstate commerce.

Despite this Court's clearly expressed concerns with special legislation, the court of appeals below held that the minimal rationality test applied to such legislation.

The court of appeals felt restrained from applying heightened scrutiny by this Court's decisions in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), and *Fort Smith Light & Traction Co. v. Board of Improvement*, 274 U.S. 387 (1927). 813 F.2d at 490-91. (A-10-13) However, none of these cases stands for the proposition that courts should not rigorously scrutinize statutes singling out individuals for burdensome treatment.

In *Dukes*, the Court applied the rational basis test to a New Orleans ordinance exempting from a prohibition on push-cart food sales in the French Quarter those vendors who had operated there for at least eight years, of whom there were two. However, the *Dukes* holding that the rational basis test should apply to legislation singling out particular individuals for *beneficial* treatment is far different from a holding that the rational basis test should apply to legislation singling out a particular person for *burdensome* treatment. For example, in *Morey v. Doud*, 354 U.S. 457 (1957), which held unconstitutional a general statute *exempting* a named company, and which *Dukes* overruled, the Court noted that an exemption of a single company presents the "converse" of a law imposing burdens on only one company. *Id.* at 467; *see INS v. Chadha*, 462 U.S. 919, 935 n.8 (1983); *id.* at 966 n.9 (Powell, J., concurring); *Attorney General of New York v. Soto-Lopez*, 106 S. Ct. 2317, 2328 (1986) (Stevens, J., dissenting) ("A governmental decision to grant a special privilege to a minority group is less objectionable than a decision to impose a special burden on a minority.").

Fort Smith Light & Traction Co v. Board of Improvement, 274 U.S. 387 (1927), does not involve the issue of the level of scrutiny to apply to a statute intentionally singling out a person by name for burdensome treatment. The state statute approved in that case was general on its face, required all street railroads to

pave portions of their tracks, and only happened to affect only one company. To the same effect is *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 (1949), where the Court upheld a South Carolina law that prohibited life insurance companies and their employees from operating an undertaking business. At the time, the plaintiff was the only company that fell within the statute's coverage. The Court held that this presented no equal protection violation:

> That respondent company is the only concern now affected by the statute does not, of course, mean a denial of equal protection. The statute is drawn in general terms; the company's success might induce others to enter the business.

Id. at 225 n.5. The *Daniel* and *Fort Smith* cases show that the fact that only one company engages in a particular business in a particular area does not prevent the legislature from regulating that business. This does not dictate the level of scrutiny that should apply when Congress singles out one small railroad in Maine from all of its competitors and imposes unique burdens upon it which are not imposed upon any other business in the country.

Nixon v. Administrator of General Services, 433 U.S. 425 (1977), also does not dictate that the rational basis test should apply to special legislation singling out a particular person for burdensome treatment. In *Nixon*, the Court rejected the former President's challenge to a statute that required him to surrender his presidential papers. The Court rejected the challenges based upon the separation of powers, presidential privilege, privacy, the first amendment, and the bill of attainder clause. In dicta, the Court implied that the statute also did not violate the equal protection clause. *See id.* at 471 n.33.

The *Nixon* opinion implies that had Mr. Nixon pressed his equal protection challenge, that challenge would fail for the same reason that the statute did not

violate the specificity element of the bill of attainder clause. In addressing President Nixon's bill of attainder argument, the Court held that it was proper for the Congress to focus upon Mr. Nixon's papers because he had entered into an agreement that created a danger of various documents being destroyed if Mr. Nixon, who was seriously ill at the time, were to die. *See id.* at 472. The Court went on to note that Congress did not deal with Mr. Nixon's papers alone, but also established a commission to study and recommend legislation regarding the preservation of the papers of future presidents.

This Court has not yet had the opportunity to construe its holding on the specificity issue in *Nixon*. The Railroad submits that this holding, at least as it applies to equal protection analysis, is strictly limited to its facts and to cases equally as extraordinary as *Nixon*. As Justice Stevens noted in his opinion concurring in the bill of attainder holding, "there is rarely any valid reason for such narrow legislation; and normally the Constitution requires Congress to proceed by general rulemaking rather than by deciding individual cases," *id.* at 486 (Stevens, J., concurring), and that "even when it deals with Presidents or former Presidents, the legislative focus should be upon 'the calling' rather than 'the person.' " *Id.* (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1867)). Justice Stevens concluded that "this case will not be a precedent for future legislation which relates, not to the Office of President, but just to one of its occupants." *Id.*

The opinion below was the first time that the *Nixon* opinion was relied upon for the proposition that the minimum rationality test should apply to special legislation singling out an individual for burdensome treatment. Because of the dangers inherent in such legislation, the *Nixon* opinion should not be read as sanctioning the use of the rational basis test for special legislation singling out a person for burdensome treatment, and this Court should grant certiorari to make

clear that heightened scrutiny must apply to such special legislation.

B. *Separation of Powers*

This Court's cases establish that when Congress intervenes in a dispute between two particular private parties and purports to "settle" the dispute between them by imposing burdens on one party, such action violates the separation of powers and is therefore void. The Court recently held that violations of Article III:

> must be assessed by reference to the purposes underlying the requirements of Article III. This inquiry, in turn, is guided by the principle that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."

Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245, 3256 (1986) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 587 (1985)).

One of the fundamental purposes of Article III is to prevent the legislature from adjudicating the rights of particular persons. *See INS v. Chadha*, 462 U.S. 919, 960-63 (1983) (Powell, J., concurring); *United States v. Brown*, 381 U.S. 437, 442-46 (1965). The Act violates this principle because it adjudicates the specific rights and liabilities of two parties to an ongoing, private dispute.

The court of appeals below recognized that "[a] statute aimed at specific individuals runs the risk of becoming an instrument that realigns particular parties' rights." 813 F.2d at 492. (A-15) However, the court held that the Act did not violate the separation of powers, because "[i]t was not addressed to a justiciable case or controversy, which is the exclusive province of the judiciary. Legislation that does not interfere with the

performance of another branch's constitutional authority does not involve the dangers the separation of powers is meant to avoid." 813 F.2d at 493 (citations omitted). (A-16)

The court of appeals below relied upon *INS v. Chadha*, 462 U.S. 919 (1983), for the proposition that the Act "was not addressed to a judiciable case or controversy . . . ." 813 F.2d at 493. (A-16) The court's reliance upon *Chadha* was misplaced. In *Chadha*, this Court disagreed with Justice Powell's position that the one-house veto of a suspension of deportation constituted a judicial act: "Federal courts do not enjoy a roving mandate to correct alleged excesses of administrative agencies; we are limited by Art. III to hearing cases and controversies and no justiciable case or controversy was presented by the Attorney General's decision to allow Chadha to remain in this country." *Id.* at 957 n.22. This Court noted that Congress had not given federal courts the power to review a decision of the Attorney General to suspend deportation of an alien, implying that no case or controversy would be presented between the alien, who wished to remain in this country, and the Attorney General, who was willing to accede to the alien's wishes. *Id.*

In this case, by contrast, there are only two active disputants, and several aspects of this dispute have been the subject of judicial proceedings. In fact, the day before the passage of the Act, the United States District Court for the District of Maine denied the Organization's request for injunctive relief, and specifically held that the Railroad was entitled to promulgate on August 6, 1986 the March 3 work rules and rates of pay. (A-3) Had Congress passed a law that stated "the Organization's request for a preliminary injunction is granted, the injunction to expire on September 13, 1986," there is no question that such a statute would violate the separation of powers. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 391-92 (1980); *Hayburn's Case*, 2 U.S. (2

Dall.) 409, 410-14 (1792). The fact that the Act is legislative in form should not change this result, *see Hurtado v. California*, 110 U.S. 516, 535 (1884), and to allow it to do so would elevate form over substance, something this Court has consistently refused to do in its separation of powers cases. *See Thomas*, 473 U.S. at 568; *Chadha*, 462 U.S. at 952.

CONCLUSION

This petition for a writ of certiorari should be granted and, upon review, the decision of the court of appeals should be reversed.

Respectfully submitted,

John Spelman
Counsel of Record

Klehr, Harrison, Harvey,
Branzburg, Ellers & Weir
1401 Walnut Street
Philadelphia, Pennsylvania 19102
(215) 568-6060

Of Counsel:

Andrew O. Schiff

Attorneys for
Petitioners

APPENDIX

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 86-1873

THE MAINE CENTRAL RAILROAD COMPANY
and THE PORTLAND TERMINAL COMPANY,
Plaintiffs, Appellants,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Gene Carter, *U.S. District Judge*]

Before
Bownes, *Circuit Judge*,
Rosenn,* *Senior Circuit Judge*,
and Selya, *Circuit Judge*.

John Spelman with whom *Andrew O. Schiff* and *Klehr, Harrison, Harvey, Branzburg, Ellers & Weir* were on brief for appellants.

Richard S. Edelman with whom *John O'B. Clarke, Jr.* and *Highsaw & Mahoney, P.C.* were on brief for appellee.

Jeffrey Clair, Department of Justice, with whom *William Kanter*, Department of Justice, *Richard K. Willard*, Assistant Attorney General, and *Richard S. Cohen*, United States Attorney, were on brief for United States, amicus curiae.

March 10, 1987

---

*Of the Third Circuit, sitting by designation.

BOWNES, *Circuit Judge*. Plaintiffs-appellants Maine Central Railroad Company and the Portland Terminal Company (collectively, Maine Central) brought an action in district court challenging the constitutionality of an Act of Congress. The challenged legislation imposed a moratorium on changes in the conditions of Maine Central's employment relationship with defendant-appellee, the Brotherhood of Maintenance of Way Employees (BMWE). The district court denied Maine Central's motion for a temporary restraining order and preliminary injunction, granted BMWE's motion for summary judgment, and dismissed the complaint. We hold that the Act was constitutional and affirm the district court.

I. BACKGROUND

Maine Central operates about 740 miles of trackage. Its lines are principally in Maine, but they extend into New Hampshire and Vermont. BMWE, a national labor organization, is the bargaining representative for Maine Central's maintenance of way employees, who perform such labor as track laying and surfacing work, roadway maintenance, and building and structural work. In April 1984 the two parties began negotiating changes BMWE had requested in the existing collective bargaining agreements. The focus of the dispute was job protection. There had been as many as 390 maintenance of way employees working on a seasonal and special project basis at Maine Central in July 1982; there are now approximately sixty-five in active service.

On March 3, 1986, BMWE called a strike. In April 1986 the strike action was extended to include secondary picketing of other railroads.[1] The National Mediation Board, whose services had been requested by BMWE initially in September 1984, determined that the Maine Central-BMWE dispute threatened to interrupt commerce and to deprive the country of essential

1. *See Brotherhood of Maintenance of Way Employees* v. *Guilford Transp. Indus., Inc.*, 803 F.2d 1228 (1st Cir. 1986), in which this court held secondary picketing resulting from the Maine Central—BMWE dispute to be lawful.

transportation services. Based on this determination a Presidential Emergency Board was appointed on May 16, 1986, to investigate the matter and to prepare a report. Exec. Order No. 12,557, 51 Fed. Reg. 18,429 (1986); *see* 45 U.S.C. § 160 (1982). Section 160 of the Railway Labor Act, which authorizes the appointment of a Presidential Emergency Board, prohibits the parties to the dispute from changing "the conditions out of which the dispute arose," except by agreement, until thirty days after the Board has made its report to the President. 45 U.S.C. § 160. That report was made on June 20, 1986, and Maine Central rejected the settlement recommended in it.

The statutory cooling-off period imposed by section 160 expired on July 20, 1986. On August 6, 1986, Maine Central unilaterally instituted new work rules and rates of pay, which included a twenty percent reduction in wages. BMWE was unsuccessful in an action in district court seeking injunctive relief to restrain Maine Central from implementing the changes.

On August 12, 1986, Congress enacted a "Joint Resolution to provide for a temporary prohibition of strikes or lockouts with respect to the Maine Central Railroad Company and Portland Terminal Company labor-management dispute." Act of Aug. 21, 1986, Pub. L. No. 99-385, 100 Stat. 819. This legislation (the Act) was approved by the President on August 21, 1986. It directed that an advisory board be appointed to make findings and recommendations on the dispute. The cooling-off period that had expired on July 20 was extended for sixty days from July 21; the parties were forbidden from changing, except by agreement, "the conditions out of which [the] dispute arose as such conditions existed before . . . March 3, 1986." 100 Stat. at 819. The Act, therefore, required Maine Central to pay its BMWE employees at pre-March 3 rates, thereby invalidating the changes instituted in August. Maine Central apparently did reinstate the wages to their pre-March 3 rates during the Act's effective period.

On August 22, 1986, Maine Central filed a complaint in district court for injunctive and declaratory relief, requesting that the Act be declared unconstitutional and that its enforcement be enjoined. The United States, as amicus curiae, filed a statement

of interest and memorandum in support of the Act. Maine Central asked to be allowed to pay into the court the difference between the pre-March 3 wage rates and the wage rates it had instituted in August, so that it would not have to recover these sums from the individual employees if its constitutional challenge proved successful. This request was denied. At a hearing on September 10, 1986, the district court denied Maine Central's request for a temporary restraining order and a preliminary injunction, and on September 17, 1986, it granted BMWE's motion for summary judgment and dismissed Maine Central's complaint. The next day, on September 18, 1986, the same day the cooling-off period imposed by the Act expired, Maine Central filed notice of this appeal.[2]

II. MOOTNESS

We first decide the preliminary question of whether Maine Central's appeal became moot when the cooling-off period imposed by the Act expired. Federal jurisdiction under article III is limited to actual cases and controversies. *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 546 (1976). "Simply stated, a case is moot when the issues are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). According to BMWE, because the cooling-off period has expired, "there is no longer a live controversy concerning the possibility that BMWE might seek to enforce the statute," and Maine Central "has no legally cognizable interest in the outcome of its challenge to the constitutionality of that legislation." We do not agree. Although the cooling-off period imposed by the Act has expired, there still are cognizable interests at stake in this appeal.

The Act required the parties to reinstate pre-March 3, 1986, working conditions retroactively to July 21, 1986, the day after the expiration of the cooling-off period that was imposed because

2. Congress subsequently made the report and recommendations of the Presidential Emergency Board binding on the parties, subject to modification by mutual agreement. Act of Sept. 30, 1986, Pub. L. No. 99-431, 100 Stat. 987. That legislation is the subject of a separate action and is not at issue here.

of the appointment of the Presidential Emergency Board. Maine Central reduced its maintenance of way employees' wages by twenty percent on August 6, 1986, and continued to pay them at that rate until the Act became effective on August 21, 1986. BMWE has brought a suit in district court to recover wages owed under the Act for that period. Maine Central asked the district court to defer its decision in that suit until we issued an opinion in this appeal, and to our knowledge that case is still pending. If we were to hold the Act to be unconstitutional, as urged by Maine Central, that claim to back wages would necessarily fail.

We cannot dismiss a case as moot if there are live issues, even if they are secondary or incidental, because there still is a case or controversy to be decided. *See Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 571 (1984) (challenge to preliminary injunction requiring employees to be reinstated not moot, even though the employees had been restored to their former positions, because, among other things, there were unresolved back pay and seniority issues); *Powell* v. *McCormack*, 395 U.S. at 495-500 (constitutional challenge to exclusion from the Ninetieth Congress was held not to be moot, even though that session of Congress had terminated and petitioner had been seated in the Ninety-first Congress, because his claim for back salary was "still unresolved and hotly contested by clearly adverse parties").[3] The back pay issue here is very much alive, and this appeal is not moot.[4]

---

3. We do not address in this appeal whether or not Maine Central can constitutionally be required to pay any wages retroactively due under the Act. We leave the resolution of that controversy to the proceedings now pending in district court. There are no factual questions, however, that must be resolved before we can consider Maine Central's arguments that the Act violated the equal protection component of the fifth amendment and the separation of powers doctrine.

4. We consequently do not decide whether this case also is not moot because it is "capable of repetition, yet evading review" as contended by Maine Central. *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).

III. CONSTITUTIONALITY

Maine Central argues that the Act is unconstitutional for two reasons. First, it violated the equal protection component of the fifth amendment[5] by singling out Maine Central for burdensome treatment. Second, it violated the separation of powers doctrine by legislatively adjudicating the rights of Maine Central and BMWE. We consider each argument in turn.

A. Equal Protection

The Supreme Court long ago made it clear that the operation of interstate railroads has a public aspect justifying the exercise of federal legislative power to keep labor disputes from interrupting interstate commerce. *See Wilson* v. *New*, 243 U.S. 332, 347-48 (1917). Congress acted pursuant to this authority when, in the Railway Labor Act of 1926, it established a compulsory railroad labor dispute resolution process. *Detroit & T.S.L. R.R.* v. *United Transp. Union*, 396 U.S. 142, 148 (1969); *Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 553-54 (1937); *see* 45 U.S.C. §§ 151-163.

The Railway Labor Act contains "rather elaborate machinery for negotiation, mediation, voluntary arbitration, and conciliation." *Detroit & T.S.L. R.R.* v. *United Transp. Union*, 396 U.S. at 148-49. An important aspect of this machinery is the government's ability to prolong negotiation while not allowing changes in the status quo by means of self-help. There is "an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day 'cooling-off' period" that follows the report of the Presidential Emergency Board. *Id.* at 152; *see* 45 U.S.C. §§ 155, 156, 160. The parties are required by these provisions to preserve and maintain the working conditions and practices that existed before

5. Of course, the equal protection clause is in the fourteenth amendment, which is applicable only to the states. The Supreme Court has instructed, however, that there is an equal protection component to the due process clause of the fifth amendment, which applies to congressional action, because "discrimination may be so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

the dispute arose. *Detroit & T.S.L. R.R.* v. *United Transp. Union*, 396 U.S. at 152. The Supreme Court described the importance of this moratorium on changes in the employment relationship:

> The [Railway Labor] Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.

Id. at 150.

In the Maine Central-BMWE dispute, the usual procedures were not enough. The final cooling-off period had expired without a resolution, and soon afterward Maine Central lowered the wages of its maintenance of way employees, an action that could be expected to result in a renewed strike. Congress responded to this threat by extending the dispute resolution process for an additional sixty days. If Congress had the power to create the Railway Labor Act scheme, which it did, it also had the power to modify it. "It was for Congress to make the choice of the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured . . . ." *Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. at 553. Maine Central argues, however, that although Congress may have the power to establish a process requiring participants in a railroad employment dispute to maintain the status quo, its right to equal protection of the laws was violated when its dispute was singled out by Congress for an additional cooling-off period.

The degree to which legislation is scrutinized for a denial of equal protection depends on the nature of the classification made in the statute. "Strict" scrutiny is only appropriate when the statute involves the inherently suspect classifications of race, national origin, or alienage, or it impinges on a fundamental personal right. *See City of Cleburne* v. *Cleburne Living Center*, 105 S. Ct. 3249, 3255 (1985). The Supreme Court has identified only two classifications that warrant "heightened" scrutiny: gender and legitimacy. *Id.* Economic legislation, like the Act, "that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose." *Hodel* v. *Indiana*, 452 U.S. 314, 331 (1981); *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 174-79 (1980).

Maine Central urges that this rational basis test, which is usually applied to economic legislation, is inappropriate "when the legislature selects a single person for adverse treatment."[6] According to Maine Central, there is an underlying presumption in the deferential rational basis test that inequities will be resolved through the political process, but this presumption is invalid when only one individual is affected.

The unresponsiveness of the democratic process to legislative burdens inequitably placed on certain groups has no doubt played a role in the formulation of the degree to which legislative classifications will be scrutinized. *See City of Cleburne* v. *Cleburne Living Center*, 105 S. Ct. at 3255 (one reason for strict scrutiny is because certain kinds of discrimination are "unlikely to be soon rectified by legislative means"). The focus, however, has not been on the number of individuals at whom the statute

---

6. We note that the Act in reality affected more than a "single person." While it prevented Maine Central from unilaterally changing its employees' wages during the cooling-off period, it also kept the employees from exercising self-help of their own by going on strike. This latter preventive was, after all, the reason why this legislation was enacted: it addressed the threat to interstate commerce. As we explain later in the opinion, however, even if economic legislation does affect only a single person, it still will be sustained if the classification was rationally related to a legitimate state interest.

is aimed, but on the nature of the classification and whether it is likely to be relevant to a legitimate state purpose. *Id.* at 3254. To subject economic legislation, which the Court has said need only have a rational basis, to heightened scrutiny because its reach is particularized would diverge from the Supreme Court's equal protection analysis framework. Indeed, the Court has instructed that when economic legislation is at issue, we are to presume that "even improvident decisions will eventually be rectified by the democratic processes." *Id.*

Maine Central relies on three Supreme Court cases as authority for its contention that heightened scrutiny should be applied. *McFarland* v. *American Sugar Ref. Co.*, 241 U.S. 79 (1916); *Cotting* v. *Kansas City Stock Yards Co.*, 183 U.S. 79 (1901); *Atchison, T. & S.F. R.R.* v. *Matthews*, 174 U.S. 96 (1899). We do not find much support for Maine Central's position in these cases. In *McFarland* v. *American Sugar Ref. Co.*, a sugar refinery successfully challenged a state statute imposing severe penalties on certain refineries. The problem with the classification was not that it affected only one company, but that it made that company presumptively guilty of a crime without "some rational connection between the fact proved and the ultimate fact presumed." 241 U.S. at 86 (quoting *Mobile, J. & K.C. R.R.* v. *Turnipseed*, 219 U.S. 35, 43 (1910)). In *Cotting* v. *Kansas City Stock Yards Co.*, the Court invalidated on equal protection grounds a state statute establishing a schedule of rates for stockyards. The statute in that case arbitrarily burdened only the Kansas City Stock Yards Company; it did not apply to other Kansas companies engaged in the same business, who could not be distinguished on a legitimate basis. 183 U.S. at 111-12. In *Atchison T. & S.F. R.R.* v. *Matthews*, the Court sustained a state statute providing for a presumption of negligence on railroads in suits to recover for damages caused by fire. The Court warned "that the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated." 174 U.S. at 104. These cases do not support Maine Central's argument for heightened scrutiny. They demonstrate the vulnerability of legislation imposing a burden on a

particular individual but not on others similarly situated. In the case now before us, Congress specifically found that Maine Central, by virtue of its labor problems, was uniquely situated.[7]

The three cases on which Maine Central relies are from an era in which the Court gave little deference to legislative judgment in economic matters. They predate *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938), *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955), and their progeny, in which the Court disclaimed any intent to scrutinize economic legislation for more than a rational basis. Even before the evolution of the rational basis test, however, the Court demonstrated that its concern was with legislation that arbitrarily singled out an individual for burdensome treatment. This point was made clear in *Fort Smith Light and Traction Co.* v. *Board of Improvement*, 274 U.S. 387 (1927), in which the Court upheld a state law requiring a single railroad to pave streets used by its trains. The act was "in form a general statute, but by reason of provisions making it applicable [only to railways with certain characteristics] it in fact applied to plaintiff in error alone." 274 U.S. at 389. The statute was held not to violate the equal protection guarantee because plaintiff's roads had unique characteristics, and equal

---

7. Maine Central also states that the Supreme Court's review of tax valuation legislation, especially *Hillsborough* v. *Cromwell*, 326 U.S. 620 (1946), demonstrates judicial hostility to legislation singling out one individual. Maine Central again overlooks the critical point that in equal protection analysis, the Court's concern is with legislation affecting one individual when there are others similarly situated, and who cannot be distinguished on some legitimate, rational basis. In *Hillsborough*, the Court said that "[t]he equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Id.* at 623. The Court in fact extends great deference to a legislature's judgment in imposing tax burdens. *See Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."); *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940) ("[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification. . . . [T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.").

protection "does not require the uniform application of legislation to objects that are different, where those differences may be made the rational basis of legislative discrimination." *Id.* at 391.

More recent cases make it clear that we are confined to the rational basis test in reviewing the Act challenged by Maine Central. In *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), the Court reviewed legislation that was enacted to gain public access to presidential materials. The object of the legislation, who was identified by name, abandoned an equal protection argument because, according to the Court, he "apparently recogniz[ed] that mere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment." *Id.* at 471 n.33.

Obviously, the legislation at issue in *Nixon* was extraordinary. Maine Central argues that this explains the Court's deference to the legislature in that case, and a legislative burden imposed on a "class of one" can only be justified in "unique or compelling circumstances." Otherwise, according to Maine Central, if there is one person in the class, the statute must be "drawn in general terms, so that if, in the future, other persons become similarly situated, they will fall within the statute's prescriptions."

Our research leads us to conclude otherwise. A classification does not become irrational or unconstitutional solely because it is specific. Two Supreme Court cases demonstrate this point. In *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976), the Court overruled *Morey* v. *Doud*, 354 U.S. 457 (1957), a case in which it had invalidated a statute identifying a "class of one" by name. In *Morey*, the Court considered the constitutionality of a currency exchange regulatory statute that excluded the American Express Company from its provisions. It said "a statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found." 354 U.S. at 465. The Court noted that "genuinely different characteristics" may justify different treatment, "even where the discrimination is by name." *Id.* at 466. The Court nevertheless

invalidated the statute, holding that the discrimination in favor of the American Express Company did not conform to the statute's purpose of protecting the public. *Id.* at 466-69.

In deciding that the statute was unconstitutional, the court relied, at least in part, on the possibility that the American Express Company would continue to be exempt if its characteristics were to change, but competitors would continue to be subject to the statute even if their characteristics became identical to the American Express Company's. *Id.* at 467. Justice Frankfurter dissented. His position was that a state is entitled to legislate "on the basis of circumstances that exist"; its acts are not unconstitutional when passed because they would be "in speculatively different circumstances that may never come to pass." *Id.* at 474 (Frankfurter, J., dissenting).[8]

Justice Frankfurter's position has since prevailed. The Court overruled *Morey*. It rejected the analysis that had been employed in that case and described "the reliance on the statute's potential irrationality" as "a needlessly intrusive judicial infringement on the State's legislative powers." *City of New Orleans* v. *Dukes*, 427 U.S. at 306. Maine Central's position that legislation must be written in such a manner as to accommodate the contingency that someone else may become similarly situated is untenable in the light of this admonition.

The Court's holding in *Dukes* confirms that our inquiry is confined to the rational basis test. The Court rejected an equal protection challenge to an ordinance prohibiting pushcart food sales in the French Quarter of New Orleans, except for vendors who had operated there for at least eight years. There were only

---

8. Justice Frankfurter said:

> "Sociologically one may think what one may of the State's recognition of the special financial position obviously enjoyed by the American Express Co. Whatever one may think is none of this Court's business. In applying the Equal Protection Clause, we must be fastidiously careful to observe the admonition of Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo that we do not 'sit as a super-legislature.' " (See their dissenting opinion in the ill-fated case of *Colgate* v. *Harvey*, 296 U.S. 404, 441 [1935]. See also *Asbury Hospital* v. *Cass County*, 326 U.S. 207, 214-215 [1945].).

354 U.S. at 475.

two such vendors. *Id.* at 300. The Court said that "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *Id.* at 303.

The Act at issue here, therefore, is subject only to the qualification that it must "be rationally related to a legitimate state interest." *Id.* The Act's purpose was very clear: "[T]o provide for a temporary prohibition of strikes or lockouts with respect to the Maine Central Railroad Company and Portland Terminal Company labor-management dispute." 100 Stat. at 819. The legitimacy of congressional interest in preventing disruptive interstate railroad labor disputes is firmly entrenched in constitutional law. Congress enacted this legislation because the usual procedures for dispute resolution were unsuccessful in heading off what it perceived to be a substantial threat to essential transportation services. *See* 100 Stat. at 819; H.R. Rep. 99-784, 99th Cong., 2d Sess. 10 (1986).[9] The Act, therefore, had a legitimate national purpose.

The focus on the Maine Central-BMWE dispute had a rational relationship to this legitimate purpose. Maine Central was not selected from among a group of similarly situated railroads. Maine Central and BMWE were the parties to the dispute "out of which the threat of interruption of interstate commerce arose, — a consideration which establishes an adequate basis for the

---

9. When the President signed the Act into law, he said:

> This Administration is against the intervention of the Federal government in the resolution of limited, isolated labor disputes. However, all the procedures in the Railway Labor Act for settling the Maine Central-BMWE dispute have been exhausted, and as a result of recent court decisions, the possibility exists of a national railroad strike stemming from this unresolved dispute.
>
> I earnestly hope that the parties will avail themselves of the additional cooling-off period . . . to settle their dispute.

Statement by the President of the United States, 22 Weekly Comp. Pres. Doc. 1119 (Aug. 25, 1986).

statutory classification." *Wilson* v. *New*, 243 U.S. at 354. Although Congress has not enacted a general prohibition on secondary picketing once the established Railway Labor Act procedures have run their course, *see Brotherhood of Maintenance of Way Employees* v. *Guilford Trans. Indus., Inc.*, 803 F.2d 1228, 1231 (1st Cir. 1986), it is not arbitrary or irrational to extend the Railway Labor Act mechanism for sixty days in the face of a strike threatening interstate commerce, rather than to prohibit such strikes in general. Congress is entitled to "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U.S. at 489. There may be hundreds of active railroad labor disputes, and, as Maine Central points out, others may turn out to have national impact, but it was the Maine Central-BMWE dispute that in Congress's judgment was threatening to disrupt interstate commerce. This was not arbitrary or irrational; the Act, therefore, did not violate the equal protection component of the fifth amendment.

B. Separation of Powers

It is a fundamental principle of our federal government that the legislative, executive, and judicial branches "be largely separate from one another." *Buckley* v. *Valeo*, 424 U.S. 1, 120 (1976). "Although not 'hermetically' sealed from one another, *Buckley* v. *Valeo*, 424 U.S., at 121, the powers delegated to the three Branches are functionally identifiable." *INS* v. *Chadha*, 462 U.S. 919, 951 (1983).

Determining whether an act is an exercise of powers designated to a particular branch, however, is a difficult task. The Court has said that an act is an exercise of legislative power when it is "essentially legislative in purpose and effect." *Id.* at 952. But the distinction between legislative and adjudicative purposes and effects can be illusory. As Justice Holmes said: "To make a rule of conduct applicable to an individual who but for such action would be free from it is to legislate—yet it is what the judges do whenever they determine which of two competing principles

of policy shall prevail." *Springer* v. *Philippine Islands*, 277 U.S. 189, 210 (1928) (Holmes, J., dissenting).

Maine Central argues that by prohibiting only it and BMWE from exercising self-help, instead of enacting legislation that generally imposed a cooling-off period on any railroad labor dispute having certain characteristics, Congress was adjudicating rather than legislating. Therefore, while the ends may have been legitimate, the means employed were improper. Maine Central points to Chief Justice Marshall's words in *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 136 (1810): "It is the peculiar province of the legislature, to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." This general observation by Chief Justice Marshall was made in the context of his inquiry into "whether the nature of society and of government does not prescribe some limits to the legislative power." 10 U.S. at 135. In the passage following the one quoted by Maine Central, he also said: "How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated." *Id.* at 136. Chief Justice Marshall, therefore, was speaking of general governmental principles, and not creating a benchmark for determining whether an act is legislative or adjudicative.

A statute aimed at specific individuals runs the risk of becoming an instrument that realigns particular parties' rights. "Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to 'the tyranny of a shifting majority.' " *INS* v. *Chadha*, 462 U.S. at 966 (Powell, J., concurring) (quoting Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 371, 375 (1976)). The legislation at issue here, however, was merely an extension to a constitutionally valid scheme for encouraging dispute resolution by preserving existing rights. In the face of a threat that interstate railroad traffic may be seriously interrupted, Congress's enumerated power to regulate interstate commerce "necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for

the situation, which included the power to deal with the dispute." *Wilson* v. *New*, 243 U.S at 348. The Act did not determine who "shall prevail." It was not addressed to a justiciable case or controversy, which is the exclusive province of the judiciary. *See INS* v. *Chadha*, 462 U.S. at 957 n.22. Legislation that does not interfere with the performance of another branch's constitutional authority does not involve the dangers the separation of powers is meant to avoid. *See Nixon* v. *Administrator of General Services*, 433 U.S. at 443.

Nothing in the Constitution says that a statute must be general in form to be legislative in nature. Unlike some state constitutions, the federal Constitution does not prohibit Congress from passing private acts that affect specific individuals. *United States* v. *Brown*, 381 U.S. 437, 473 (1965) (White, J., dissenting); *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 380 (1940). The bill of attainder clause proscribes Congress from enacting statutes, "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *United States* v. *Lovett*, 328 U.S. 303, 315-16 (1946). The statute at issue here does not impose punishment "of any form or severity." *United States* v. *Brown*, 381 U.S. at 447.

In *Nixon* v. *Administrator of General Services*, 433 U.S. at 425, the Court, in discussing the bill of attainder clause, rejected an argument that "the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality." *Id.* at 469-70. The Court said that this "view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality." *Id.* at 470. This reasoning applies equally as well to a statute not alleged to be a bill of attainder. If legislation with a legitimate state purpose and classification becomes nonlegislative solely because it was not "defined at a proper level of generality," then legislation that affects only a few — no matter

what its purpose or the legitimacy of the classification — becomes vulnerable to constitutional attack. We conclude, therefore, that a law that is an otherwise valid exercise of legislative authority does not go beyond that authority solely because it affects a named few, and we hold that the Act did not violate the separation of powers doctrine.

III. CONCLUSION

Congress was concerned that the Maine Central-BMWE labor dispute would seriously disrupt interstate railroad traffic. It could have addressed this threat by amending the Railway Labor Act procedures. But it did not. It opted to take the smaller step of extending the cooling-off period for an additional sixty days for these two parties. Given the deference the courts owe to Congress when it enacts economic legislation, this decision to focus on the Maine Central-BMWE dispute did not violate the constitutional guarantee of equal protection of the laws. Congress exercised its power over interstate commerce with this legislation; it did not interfere with the judiciary's exclusive authority over cases and controversies, and, therefore, it did not violate the separation of powers doctrine. We affirm the district court's decision that the Act was constitutional.

Affirmed.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 86-1875

THE MAINE CENTRAL RAILROAD COMPANY AND
PORTLAND TERMINAL COMPANY,
Plaintiffs, Appellants,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Defendant, Appellee.

JUDGMENT

Entered: March 10, 1987

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano

Clerk.

[cc: Messrs. Spelman, Edelman and Clair]

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MAINE CENTRAL RAILROAD COMPANY and PORTLAND TERMINAL COMPANY, Plaintiffs	CIVIL ACTION No. 86-00263 P
v.	
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Defendant	BENCH RULING

(Hearing held before HON. GENE CARTER, in the United States District Court, Federal Building, Portland, Maine, on the 10th day of September, 1986, beginning at 3:15 PM, ruling of the Court as follows:)

The Court has had an opportunity to review all of the written submissions in this matter and has done so. Having reviewed all of the materials on several occasions, and I'm talking about the materials that relate to the motion for temporary restraining order and written submissions on the motion for summary judgment, which is agreed to by the plaintiff as the basis for the Court to act and having heard the arguments of counsel, the Court is now prepared to act on the issues, by the following bench ruling.

The Court is not satisfied from the discussion in the written submissions, and in oral argument, that Congress in enacting legislation for the purpose of carrying out its obligation and its authority to regulate commerce amongst several states is prohibited from directing such legislation at a single person or business entity. In short, the Court is not satisfied that a class of one, as the defined class to which said legislation is to apply, for the purpose of regulating interstate commerce, is *per se* impermissible. The Court respectfully believes that that is, in essence, the thrust of the plaintiff's argument here.

The Court is convinced from its reading of the pertinent authorities, which are rather voluminous, that, quite to the contrary, where the selection of entities to which regulatory legislation is to apply are few in number, even to the extent of being a single entity or person, Congress may validly so limit the impact of its legislation, as long as there is a reasonable basis for the Congress to suppose that such limitation of the scope of its impact will be sufficient to accomplish the purposes of the legislation, without imposing an undue and arbitrary burden upon the subjects of the legislation.

It's very clear here that at the time the legislation in question was enacted, the Maine Central Railroad and the BMWE, and its 66 employees were the only entities as persons then existing in the United States, which by virtue of an ongoing labor dispute, subject to the provisions of the Railway Labor Act, continuing after exhaustion of a Section 10 moratorium period, presented a threat of self help on the part of the parties, (which prior specific experience demonstrated would be likely to spread to secondary strikes and picketing to other railroads) thereby imperil in a large part the rail transportation system, certainly of the East Coast, and perhaps of the nation. Such a factual judgment when made by Congress is one to which the Court, on the facts as they appear in the record of this case, must defer.

Congress having made that determination, the Court is aware of no limitation upon its authority imposed by the constitution, so long as it has acted for the purpose of dealing with that specific problem, that specific hazard, and that specific cause of the problem and hazard in good faith, in a reasonable manner, and on a basis that is rationally supportable as legislation sufficient to accomplish the end which Congress envisioned.

Now, Congress' decision with respect to this legislation is supportable for any number of reasons. The principal ones being that the effect of the legislation is, in the view of the Court, not to adjudicate the rights of the parties, not to impose a contract upon either of the parties, but simply to continue the Section 10 moratorium.

Congress simply said by this legislation, in the interest of avoiding a catastrophic disruption of rail transportation, we require, for another period of 60 days, that the parties respect the *status quo* and continue to negotiate under the obligations imposed by the Railway Labor Act.

There is at stake here, as the Court has pointed out in discussions with counsel, on the part of the railroad, the opportunity, which it seeks to redress for a period in actual fact of about 2 and-a-half weeks, to impose its own terms and conditions of employment and its own wage structure under the contract, (which it had previously attempted to implement I believe on August 6) with respect to 66 employees, and the counterbalance public interest in requiring that the Railroad's right be temporarily foregone in the interest of avoiding what Congress has found is the extensive hazard of a major disruption of rail transportation. That legislative purpose is hardly arbitrary in substance and is hardly discriminatory in purpose. It is not even unfair to either the Railroad or the union in any way.

It is the Congress' responsibility, because it has the authority under the constitution and the law, to effectively regulate Interstate Commerce, to see that disruptions in it are avoided, if at all possible. The Congress has undertaken, in the view of the Court, to exercise that authority for that purpose in a manner that is not at all unreasonable or arbitrary, and not unduly burdensome upon any of the parties to whom the legislation applies.

The Court is fundamentally satisfied that there is no constitutional violation of the rights of either the railroad, or of the union and its employees, arising from the implementation of this legislation, and the Court is likewise satisfied, that being the case, that it is very clear that the public interest will be best served if the legislation is permitted to remain in effect, and if this request for a temporary restraining order is denied.

That latter finding is the very converse of the burden the plaintiff undertakes in order to obtain preliminary injunctive relief, which is that the plaintiff must prove that the public *interest will not be adversely affected* by the granting of the injunction.

Here it is clear to the Court beyond peradventure of doubt that the granting of this injunction would adversely affect, in all

probability, the public interest in maintaining an ongoing and operating system of rail transportation, at least on the East Coast. That is so because the effect of granting the injunction would be to put both parties in an environment where they could exercise self help. The railroad has clearly indicated it intends to impose, as soon as it may properly do so, in deference to the Court's opportunity to decide the issues generated in these proceedings, its amended contract change, existing wages, hours and working conditions from those that existed under the *status quo*.

The Court thinks that it is more than likely that once that occurs, with the Section 10 moratorium now finally at an end, that self help on the part of the Union will inevitably follow, if not immediately, within a very short period of time. The effect of such self help would be the spread of secondary strikes and picketing to other railroads and the realization of the hazard which Congress has sought to avoid by the enactment of this legislation.

Accordingly, it is hereby ORDERED the motion for temporary restraining order be and it is hereby DENIED.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

THE MAINE CENTRAL RAILROAD COMPANY and THE PORTLAND TERMINAL COMPANY,	)	
Plaintiffs	)	
v.	)	CIVIL NO. 86-0263 P
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,	)	
Defendant	)	

JUDGMENT

In accordance with the action taken by the Court, Carter, J., on September 16, 1986, granting defendant, Brotherhood of Maintenance of Way Employes', motion for summary judgment, judgment is hereby entered for the defendant, Brotherhood of Maintenance of Way Employes, against the plaintiffs, The Maine Central Railroad Company and The Portland Terminal Company, and the complaint is hereby DISMISSED.

Dated at Portland, Maine, this 17th day of September, 1986.

/s/ W.S. Brownell

Clerk, United States District Court

APPENDIX C

Joint Resolution

To provide for a temporary prohibition of strikes or lockouts with respect to the Maine Central Railroad Company and Portland Terminal Company labor-management dispute.

Whereas the labor dispute between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, and certain of the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees threatens essential transportation services of the Nation;

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained;

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers;

Whereas it is desirable to resolve such dispute in a manner which encourages solutions reached through collective bargaining;

Whereas the President, pursuant to section 10 of the Railway Labor Act (45 U.S.C. 160), by Executive Order No. 12557 of May 16, 1986, created a Presidential Emergency Board to investigate the dispute and report findings;

Whereas the recommendations of Presidential Emergency Board No. 209 for settlement of such dispute have not yet resulted in a settlement; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the final paragraph of section 10 of the Railway Labor Act (45 U.S.C. 160) shall apply and be extended for an additional period of 60 days beginning on July 21, 1986, with respect to the dispute referred to in Executive Order No. 12557 of May 16, 1986, so that no change, except by agreement, shall be made by the common rail

carriers, Maine Central Railroad Company and Portland Terminal Company, or by the employees of such carriers in the conditions out of which such dispute arose as such conditions existed before 12:01 ante meridiem of March 3, 1986.

Sec. 2. (a) Not later than 10 days prior to the expiration date of the 60-day period referred to in the first section of this joint resolution the board established under subsection (b) shall submit to the Congress a full and comprehensive report containing—

(1) the progress, if any, of negotiations between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, and the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees;

(2) findings of fact regarding financial and other circumstances related to the dispute described in this resolution, including, but not limited to, developments since March 3, 1986; and

(3) recommendations for a proposed solution of the dispute described in this resolution, including, but not limited to, the issues covered by Presidential Emergency Board Numbered 209.

(b) The National Mediation Board shall appoint a three-member board for the purpose of preparing and submitting the report described in subsection (a). No member appointed to such board shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of such members shall be fixed by the National Mediation Board. The second paragraph of section 10 of the Railway Labor Act shall apply to the expenses of the board established under this subsection as if such board were a board created under such section 10.

(c) The board appointed under subsection (b) shall terminate upon the submission to the Congress of the report required under subsection (a).

APPENDIX D

Joint Resolution

To provide for a settlement to the Maine Central Railroad Company and Portland Terminal Company labor-management dispute

Whereas the labor dispute between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, and certain of the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees threatens essential transportation services of the Nation;

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained;

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers;

Whereas the President by Executive Order Numbered 12557 of May 16, 1986, pursuant to the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160), created a Presidential Emergency Board to investigate the dispute and report findings;

Whereas the recommendations of Presidential Emergency Board Numbered 209 for settlement of such dispute have not yet resulted in a settlement;

Whereas the extension of the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160) for an additional 60-day period to such dispute provided by the joint resolution entitled: "Joint resolution to provide for a temporary prohibition of strikes or lockouts with respect to the Maine Central Railroad Company and the Portland Terminal Company labor-management dispute", approved August 21, 1986 (Public Law 99-385), has not yet resulted in a settlement of such dispute;

Whereas the advisory board established pursuant to section 2 of such joint resolution recommended that in the event that the parties to the dispute were unable to reach agreement on the dispute before September 13, 1986, the Congress should enact legislation directing the parties to accept and apply the recommendations of Emergency Board Numbered 209, and if such

parties are unable to agree as to all necessary details in applying the recommendations of such Emergency Board, all such unsettled issues should be submitted to final and binding arbitration;

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not yet resulted in settlement of the dispute;

Whereas the Congress, under the Commerce Clause of the Constitution, has the authority and responsibility to ensure the uninterrupted operation of essential transportation services; and

Whereas the Congress in the past has enacted legislation for such purposes: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following conditions shall apply to the dispute referred to in Executive Order Numbered 12557 of May 16, 1986, between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company (hereafter in this resolution referred to as the "carriers") and the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees.

(1) The parties to such dispute shall take all necessary steps to restore or preserve the conditions out of which such dispute arose as such conditions existed before 12:01 ante meridiem of March 3, 1986, except as provided in paragraphs (2) through (4).

(2) The report and recommendations of Presidential Emergency Board Numbered 209 shall be binding on the parties and shall have the same effect as though arrived at by agreement of the parties under the Railway Labor Act (45 U.S.C. 151 et seq.), except that nothing in this joint resolution shall prevent a mutual written agreement by the parties to any terms and conditions different from those established by this joint resolution.

(3)(A) If there are unresolved implementing issues remaining with respect to the report and recommendations or agreement under paragraph (2) after ten days after the date of the enactment of this joint resolution, the parties to the dispute shall enter into binding arbitration to provide for a resolution of such issues.

(B) The National Mediation Board established by section 4 of the Railway Labor Act (45 U.S.C. 154) shall appoint an arbitrator to resolve the issues described in subparagraph (A). Except as provided in this joint resolution, such arbitration shall be conducted as if it were under section 7 of such Act, and any award of such arbitration shall be enforceable as if under section 9 of such Act.

(4) Within thirty days after the date of the enactment of this joint resolution, the binding arbitration entered into pursuant to paragraph (3) shall be completed.